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automatically renewed by a savings association which has a regulatory capital deficiency under paragraph (b)(7) of this section.

(7) *Eligibility requirements.* A savings association that issues or has outstanding repurchase agreements issued pursuant to paragraph (b) of this section shall calculate its total capital on a monthly basis in accordance with part 567 of this chapter. A savings association that does not have total capital equal to the sum of one percent of all liabilities of the savings association, plus an amount equal to 20 percent of the savings association's assets classified under § 563.160 of this part, shall not issue or renew repurchase agreements under paragraph (b) of this section unless it meets the following additional requirements:

(i) Within 45 days after the determination of a regulatory capital deficiency under paragraph (b)(7) of this section, the savings association shall file with the OTS pursuant to § 516.1 of this chapter and shall continue to file thereafter on a current basis for as long as the regulatory capital deficiency shall exist, the following:

(A) Three copies of an opinion of independent legal counsel that the interest of repurchase agreement purchasers in the security or securities underlying the repurchase agreements constitutes a perfected security interest under applicable state law; and

(B) The offering document required under paragraph (b)(5) of this section.

(ii) Within 45 days after the determination of a regulatory capital deficiency under paragraph (b)(7) of this section, and thereafter on a date certain in each succeeding week of the original or renewed term of the repurchase agreement for as long as the regulatory capital deficiency shall exist, the market value of the savings association's security or securities underlying a repurchase agreement shall be at least equal to 105 percent of the principal amount of the issuing savings association's repurchase agreement obligation, plus accrued interest.

(iii) A savings association which has a regulatory capital deficiency under paragraph (b)(7) of this section shall not renew an outstanding repurchase agreement unless it provides the pur-

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chaser with the disclosure document required under paragraph (b)(5) of this section and the purchaser thereafter affirmatively elects to renew the repurchase agreement.

[54 FR 49552, Nov. 30, 1989, as amended at 57 FR 33438, July 29, 1992; 59 FR 66159, Dec. 23, 1994]

Subpart D [Reserved]

Subpart E—Limits Tied to Capital Levels

§ 563.133 [Reserved]

§ 563.134 Capital distributions.

(a) *Definitions*—(1) *Capital distribution* means:

(i) Any dividend paid or other distribution in cash or in kind (valued and accounted for in accordance with generally accepted accounting principles) made on or with respect to any shares of an association, but not including a dividend consisting of shares of the association;

(ii) Any payment made by an association to repurchase, redeem, retire or otherwise acquire any of its shares;

(iii) Other distributions charged against the capital accounts of an association;

(iv) Any payments to shareholders of an association by an acquiring association to acquire ownership of the association, other than distributions of shares of the acquiring association; and

(v) Other types of transactions determined by the Office to entail the payout of capital by an association.

(2) *Capital* means total capital as defined under § 567.5(c) of this chapter.

(3) *Capital requirement* means an association's capital requirement under part 567 of this chapter.

(4) *Minimum capital requirement* means an association's tangible capital, leverage ratio and risk-based capital requirements as required by § 567.2 of this chapter, as modified to reflect any individual minimum capital requirement applicable to the association.

(5) *Net income* means an association's net income computed in accordance with generally accepted accounting principles.

(6) *Shares* means common and preferred stock; and any options, warrants, or other rights for the acquisition of such stock. This term does not include convertible debt securities prior to their conversion into common or preferred stock or other securities that are not equity securities at the time of a capital distribution. The term "share" does include:

(i) Convertible securities upon their conversion into common or preferred stock; and

(ii) Securities structured for the purpose of evading the restrictions on capital distributions in this section.

(7) *Surplus capital ratio* means the percentage by which an association's capital-to-assets ratio exceeds the ratio of its capital requirement to its assets.

(8) *Tier 1 association* means an association that has capital immediately prior to, and on a *pro forma* basis after giving effect to, a proposed capital distribution that is equal to or greater than the amount of its capital requirement.

(9) *Tier 2 association* means an association that has capital immediately prior to, and on a *pro forma* basis after giving effect to, a proposed capital distribution that is equal to or in excess of its minimum capital requirement, but that is less than the amount of its capital requirement.

(10) *Tier 3 association* means an association that has capital immediately prior to, or on a *pro forma* basis after giving effect to, a proposed capital distribution that is less than the amount of its minimum capital requirement.

(b) *Limits on capital distributions*—(1) *Tier 1 Association.* (i) A tier 1 association is authorized to make capital distributions during a calendar year up to the higher of:

(A) 100 percent of its net income to date during the calendar year plus the amount that would reduce by one-half its surplus capital ratio at the beginning of the calendar year; or

(B) 75 percent of its net income over the most recent four-quarter period.

(ii) A tier 1 association shall not make capital distributions in excess of the foregoing limit except in accordance with the notice and opportunity for objection process provided by paragraph (e) of this section.

(2) *Tier 2 Association.* A tier 2 association is authorized without the need for approval by the Office to make capital distributions in accordance with the following schedule:

(i) If an association's current capital satisfies the risk-based capital standard that would be applicable to it as of January 1, 1993, computed based on its current portfolio, it may make capital distributions up to 75 percent of its net income over the most recent four-quarter period;

(ii) If an association's current capital satisfies the risk-based capital standard that would be applicable to it on January 1, 1991, computed based on its current portfolio, it may make capital distributions up to 50 percent of its net income over the most recent four-quarter period;

(iii) If an association's current capital satisfies its current risk-based capital requirement, the association may make capital distributions up to 25% of net income over the most recent four-quarter period; and

(iv) In computing an association's current permissible amount of capital distributions, an association must deduct the amount of capital distributions that it has previously made during the most recent four-quarter period.

A tier 2 association shall not make capital distributions in excess of these limits except in accordance with the prior written approval process provided in paragraph (e) of this section.

(3) *Tier 3 association.* A tier 3 association is not authorized to make any capital distributions:

(i) Unless it receives prior written approval granted pursuant to paragraph (e) of this section; or

(ii) In the case of an association operating in compliance with an approved capital plan, the capital distribution is consistent with the association's capital plan. A tier 3 association may submit a separate request for authorization to make capital distributions, or may make such request as part of another request or application that is related to the capital distribution. In the case of such a combined filing, however, the request for authorization to make capital distribution must be clearly identified as such.

(4) The Office may prohibit any capital distribution otherwise permitted under this section upon a determination that the making of a capital distribution would constitute an unsafe or unsound practice. Among the circumstances posing such risk would be a capital distribution by a tier 1 or tier 2 association whose capital is decreasing because of substantial losses.

(5) An association meeting the tier 1 capital criteria but that has been notified that it is in need of more than normal supervision shall be treated as a tier 2 or tier 3 association, unless the Office determines that such treatment is not necessary to ensure the association's safe and sound operation. The Regional Director shall have discretion to determine whether to treat the association as a tier 2 or tier 3 association for this purpose, and if treated as a tier 2 association, to establish which subset of tier 2 standards will be applicable to that association.

(6) No association may make a capital distribution prohibited by any statute or regulation, including but not limited to § 563b.3(g) of this chapter, or prohibited by any agreement entered into by the association with the Office (or its predecessor agencies) or the FDIC, unless:

(i) With respect to § 563b.3(g) of this chapter, approval is granted under part 563b of this chapter; or

(ii) With respect to other limitations, prior approval is granted pursuant to paragraph (e) of this section.

(c) *Notice or approval of capital distributions.* An association must provide OTS with 30-day advance written notice of all proposed capital distributions whether or not supervisory approval is required under this section. For capital distributions requiring approval under this section, an association shall provide this prior notification by submission of a written application to make such capital distributions. A separate notice or application is not necessary if a notice or application providing sufficient information to the Regional Director is required under other Office regulations for the making of the proposed capital distribution. In such instance, the standards of this section shall be used as part of the criteria for determining the

appropriateness of and appropriate amount of capital distributions to permit in approving, not disapproving, or conditioning the other application. An association has the burden of stating clearly that the notice or application submitted for other purposes is also serving as its notice or application for purposes of this section. Associations may seek approval or provide notice of prospective capital distributions by submitting schedules of such prospective capital distributions in accordance with supervisory guidance on such procedures.

(d) *Corporate reorganizations.* The tiered limits set forth above in paragraph (b) of this section shall be applicable to any direct or indirect distributions of capital to affiliates, including those in connection with corporate reorganizations.

(e) *Supervisory action.* (1) In determining whether to object to capital distributions in excess of the safe-harbor amount under paragraph (b)(1) of this section, the Office will evaluate whether the exception would be inconsistent with the safe and sound operation of the tier 1 association. In determining whether to approve capital distributions in excess of the safe-harbor amounts under paragraph (b)(2) of this section, the Office will evaluate whether the exception would affirmatively promote the safe and sound operation of the tier 2 association. The Office also may authorize a capital distribution by a tier 3 association under paragraph (b)(3) of this section upon a compelling showing that such a capital distribution would affirmatively promote the safe and sound operation of the tier 3 association. A factor that would be regarded favorably by the Office in deciding upon applications to make capital distributions above the limits set in paragraphs (b)(1), (b)(2) and (b)(3) of this section is whether an association will be making additional equity security issuances that would raise an association's capital level and, that overall with any attendant capital distributions, would have a beneficial effect on the safe and sound operation of the association. Such authorization may be granted separately, or in conjunction with approval of a related submission or application, such as a capital plan or

acquisition of control filing. An application for such supervisory approval under paragraphs (b)(2) and (b)(3) of this section shall set forth all information determined sufficient for supervisory purposes and shall substantiate why the requested capital distribution should be permitted under the applicable criteria for its tier.

(2) The requirements of this section shall supersede the provisions of agreements or conditions to approved applications controlling associations' capital distributions that were less stringent than the restrictions imposed under this rule.

(3) An association subject to restrictions under an agreement or application condition that are more stringent than the restrictions imposed by this rule may submit a written notice to OTS seeking to be subject to this rule. The Office within 30 days of receipt of the notice will evaluate the notice and make a determination of whether the facts initially warranting imposition of the more stringent agreement or condition warrant the continuation of those restrictions or if the provisions of this section should apply to the association.

[55 FR 27196, July 2, 1990, as amended at 57 FR 14347, Apr. 20, 1992; 57 FR 33438, July 29, 1992; 60 FR 66718, Dec. 26, 1995; 62 FR 66263, Dec. 18, 1997]

Subpart F—Financial Management Policies

§ 563.161 Management and financial policies.

(a) For the protection of its account holders and other savings associations each savings association and service corporation thereof shall maintain safe and sound management and shall pursue financial policies that are safe and consistent with economical home financing and the purposes of federal savings associations and are appropriate to their respective types of operations; in implementing this regulation the Office will take into consideration that service corporations may be authorized to engage in activities which involve a higher degree of risk than do activities permitted to savings associations.

(b) Compensation to officers, directors, and employees of each savings as-

sociation and its service corporations shall not be in excess of that which is reasonable and commensurate with their duties and responsibilities. Former officers, directors, and employees of savings association or its service corporation who regularly perform services therefor under consulting contracts are employees thereof for purposes of this paragraph (b).

§ 563.170 Examinations and audits; appraisals; establishment and maintenance of records.

(a) *Examinations and audits.* Each savings association and affiliate thereof shall be examined periodically, and may be examined at any time, by the Office, with appraisals when deemed advisable, in accordance with general policies from time to time established by the Office. The costs, as computed by the Office, of any examinations made by it, including office analysis, overhead, per diem, travel expense, other supervision by the Office, and other indirect costs, shall be paid by the savings associations examined, except that in the case of service corporations of Federal savings associations the cost of examinations, as determined by the Office, shall be paid by the service corporations. Payments shall be made in accordance with a schedule of annual assessments based upon each savings association's total assets and of rates for examiner time in amounts determined by the Office.

(b) *Appraisals.* (1) Unless otherwise ordered by the Office, appraisal of real estate by the Office in connection with any examination or audit of a savings association, affiliate, or service corporation shall be made by an appraiser, or by appraisers, selected by the Office's Regional Director of the Region in which such savings association is located. The cost of such appraisal shall promptly be paid by such savings association, affiliate, or service corporation direct to such appraiser or appraisers upon receipt by the savings association, affiliate, or service corporation of a statement of such cost as approved by such Regional Director. A copy of the report of each appraisal made by the Office pursuant to any of the foregoing provisions of this section